The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development

DISCUSSION PAPER

to develop

A FRAMEWORK FOR CONSULTATION GUIDELINES

DRAFT

The ideas presented in this discussion paper are intended to stimulate discussion. We would like to hear your ideas and feedback on what we have presented.

July 29, 2005

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106-01959/

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DRAFT

Background

Through the *Aboriginal Policy Framework*, Alberta committed to consult with Aboriginal people when land management and resource development decisions may infringe their existing treaty or other constitutional rights in relation to provincial Crown lands. Beginning in September 2003 Alberta engaged industry and First Nations throughout Alberta in dialogue about consultation and what the government's consultation policy should address. The Government of Alberta's *First Nations Consultation Policy on Land Management and Resource Development* (Policy) was approved on May 16, 2005. The Policy outlines Alberta's approach to how it will meet its consultation responsibilities and Alberta's expectations of "Project Proponents"[1] and First Nations in achieving the goal of increasing certainty for all parties with respect to land management and resource development activities.

The Government of Alberta (Alberta) is now moving onto the next stage of this process by preparing consultation guidelines (Guidelines). Beginning in January 2005, Alberta spoke with small advisory groups about Guidelines and we have more recently sought further advice on what the process for developing Guidelines should look like. This paper is intended to engage First Nations and industry in dialogue about a Framework for Guidelines (Framework). Once that Framework is completed, Alberta will then begin a process to develop the Guidelines themselves.

The Framework will identify the procedures, criteria or tests that will be common in each of the industry- or regulation-specific Guidelines. The Guidelines will set out the detailed procedures for a specific regulated subject area. The primary objective in developing the Guidelines will be to seek opportunities for meaningful consultation within existing legislation and regulations. In doing so, the Guidelines will have to meet the standards set out in the Framework. Alberta's objective in this dialogue is to create an effective consultation process and to build, maintain, and foster strong working relationships among First Nations, industry and government.

Government Roles

Alberta will consult on strategic-level decisions or major projects and manage the consultation process. In doing so, Alberta sees three roles for government under the Policy:

1. FACILITATOR

Alberta is establishing a process in which consultation will occur and is engaging in activities to assist that process such as traditional use studies (TUS), assisting First Nations to build capacity to be consulted, and increasing First Nations' understanding of government and regulatory processes. This includes those activities identified in the Policy as "General Consultation." This role may also include consultation by Alberta with affected First Nations on strategic-level decisions or major projects. This is an important part of the government's role in the consultation process. Currently, Alberta consults on such things as access management plans, fisheries management, historical and resources impact assessments, environmental impact assessments, aspects of forest management, and more. Criteria on when the government will engage directly in consultations will be determined as Alberta develops the Guidelines.

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[1] "Project Proponent(s)" refers to parties who propose natural resource developments and, in some circumstances, may include government.

Background

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2. REGULATOR
Alberta has a role through the Policy and the Guidelines to identify what is expected of each party involved in consultation. Such expectations will become more detailed as we proceed and learn from our experiences, with the potential that the process may result in legislative and regulatory change.

3. DECISION-MAKER
Decision-makers, through existing regulatory processes, will consider the information flowing from the consultation process to determine whether consultation has been adequate in the circumstances of a particular application or decision.

What Alberta is Doing Now

In the Policy, Alberta commits to a range of activities referred to as General Consultation. Alberta's efforts are focused on:

a) building relationships;
b) improving methods of sharing information;
c) identifying potential land-use conflicts;
d) meeting Alberta's responsibilities to consult;
e) building First Nations' capacity to be consulted; and
f) discussing other topics of mutual interest (such as economic opportunities, as discussed on page 5).

These activities will be coordinated among Ministries and undertaken with all Alberta First Nations and are in addition to any activities specified in the Guidelines.

Provide First Nations with Information about Government

Alberta participates in information-sharing sessions with First Nations at the request of specific First Nations, or as initiated by individual Ministries. The Ministries share information about their respective roles and responsibilities, legislation, regulatory processes, and programs to help First Nations understand Alberta's business areas and programs.

Strive to Increase Alberta's Understanding and Knowledge of First Nations

Alberta has undertaken significant efforts to increase its understanding of First Nations by providing Aboriginal awareness training to staff and by building its own capacity to engage with First Nations. In addition, Alberta invites the opportunity to sit with First Nations to learn about their history and culture.

Alberta also seeks opportunities to include First Nations in other processes such as land-use planning. This is an important opportunity to identify First Nation land use and sensitive locations so as to avoid infringements in the future. Towards this goal, Alberta will ensure that the provincial land base is used as effectively as possible, recognizing traditional and other users. The government, in consultation with Albertans, will develop a comprehensive land-use policy for the province.

Building Capacity for Consultation

The Ministry of Aboriginal Affairs and Northern Development administers the First Nations Consultation Capacity Initiative on behalf of Alberta. This initiative assists First Nations to develop or enhance their

internal processes for responding to requests for consultation on land and resource development. Enhanced capacity in First Nations supports implementation of the Policy and Guidelines, by assisting First Nations to develop methods to effectively participate in the consultation process.

Traditional Use Studies (TUS)

Alberta intends to move toward a long-term program of supporting TUS activities that will be an integral part of Alberta's overall consultation strategy.

Some First Nations are finding it helpful to share information about important traditional use locations. It is clear from this experience that TUS data can be a critical tool in an efficient and effective consultation process. TUS data can provide Alberta, industry and First Nations with a quick reference to determine when impacts to traditional use sites might occur, to assist in avoiding conflicting land uses, and to provide effective protection for important First Nations traditional use sites.

Where Alberta funds TUS, data-sharing is required. The use of TUS data will be governed by data-management agreements that are or will be negotiated with First Nations. Alberta has explored means to keep such data confidential, and will remain sensitive to First Nations' concerns respecting its use.

Where First Nations have shared TUS data with Alberta, this information will be used to:

1. assist Alberta with land or resource management planning to identify areas of potential infringement of First Nations rights if development proceeds;
2. determine which First Nations should be consulted with regard to a development project;
3. determine which First Nations should be consulted with regard to a development project;
4. engage existing referral systems or trigger mechanisms in Alberta's regulatory processes so that development proposals can be evaluated to see if impacts to TUS sites or locations might occur;
5. identify where potential conflicts may occur, to work with the Project Proponent and First Nation to mitigate impacts, and to determine suitable courses of action; and
6. apply measures to protect particularly significant TUS locations through existing or future legislative provisions.

Developing New Approaches

Alberta will look for opportunities to develop new practices and practical approaches to consultation. When those practices have proven to be effective and efficient, the Guidelines may be amended to reflect such approaches.

Economic Partnerships Initiative

At this time, Aboriginal Affairs and Northern Development is working on the First Nations Economic Partnerships Initiative. This new and separate initiative will promote partnerships and build capacity for First Nations in order to capitalize on economic opportunities. The initiative is currently being designed and guidelines for accessing the initiative's programs will be made available in the fall. For more information, please contact Janene Blenkhorn, Policy Coordinator, Aboriginal Initiatives, at 780-422-8979.

Developing Guidelines

Alberta will develop the Guidelines to facilitate First Nations consultation and will specify procedures and clarify roles related to the following activities:

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Developing Guidelines

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1. Identifying projects that may require consultation.
2. Notifying potentially affected First Nations.
3. Providing First Nations with sufficient information, such as project location and description, construction timelines, etc.
4. Providing First Nations with reasonable time to consider the information provided.
5. Identifying (by First Nations) how the proposed project will impact use of the land and particularly how it will infringe on a First Nation Right and Traditional Use[2].
6. Reviewing consultation activities and considering First Nations concerns and whether mitigation /accommodation is required and, if so, what type of mitigation/accommodation is required.
7. Making and communicating the decision.

Project-Specific Consultation

While government may be engaging in consultations related to broad resource management initiatives, the Framework and the Guidelines are required for project-specific consultation. The Framework will identify the procedures, criteria or tests that will be common in each of the industry- or regulation-specific Guidelines. The Guidelines will set out the detailed procedures for a specific regulated subject area.

In preparing for the dialogue with First Nations and industry about the Framework, Alberta has identified four issues that the Framework needs to address. These four issues have created the biggest challenges. Our dialogue and your ideas will help find solutions—resolving these issues is key to making Alberta's consultation process efficient and effective for all concerned parties.

ISSUE 1: What projects require consultation?

Alberta intends to consult in those instances where significant impacts or potential infringements may occur. There are tens of thousands of dispositions[3] issued every year in Alberta owing to the volume of land and resource development projects. Alberta has learned through feedback from First Nations and industry in our early discussions that consulting on every disposition is not practical. Consulting on every disposition will mean that too little attention is paid to the most important projects. Alberta's engagement in consultation related to broad resource-management initiatives will assist in identifying the important projects for consultation. Nevertheless, further discussion is required on this issue.

Alberta needs your help to develop an effective and efficient way for all parties to process the large volume of dispositions.

Key Discussion Points

In discussions so far, the following ideas have been suggested. Do you have other ideas?

- An idea that has already been implemented through data-sharing agreements is that TUS data should provide one key early-warning mechanism for determining when consultation on a disposition should be considered. For this strategy to work in dealing with the enormous volume of dispositions, TUS data must be routinely available for use in regulatory processes.

[2] A "Right or Traditional Use" includes use of public lands such as burial grounds, gathering sites, and historic or ceremonial locations and existing constitutionally protected rights to hunt, trap and fish and does not refer to proprietary interests in the land.

[3] "Dispositions" include authorizations, licenses, permits, and approvals.

- While respecting the sensitive nature of the information, what's the most effective and efficient way to make traditional use data available?
- How do we manage in the interim until traditional use studies are complete?
- How do companies continue to access traditional use information that's available?
- What are the roles of the different parties related to completing traditional use studies and managing the data.

- Many projects require multiple dispositions. For example, development of one well site may require a subsurface lease, a surface lease, a road approval, a pipeline approval, and a water licence.

  - Can Alberta consult on all dispositions at the same time?
  - Or, can we bundle projects through a regional approach to consultation?

- Could broader land-use planning initiatives assist the process?

- In some industries, as many as 50% of dispositions are granted but never used. Can we consult once work is guaranteed to proceed?

- Different activities have varying effects on the land. Which activities pose the greatest concern?

ISSUE 2: Once projects have been determined to require consultation, which First Nations should be contacted?

The Guidelines need to set out a process for determining which First Nations should be notified about a particular project. One way to determine who should be notified for consultation is to consider TUS data that has been shared through data-sharing agreements.

Key Discussion Points

In discussions so far, the following ideas have been suggested. Do you have other ideas?

- How should Alberta use TUS data in determining which First Nations should be consulted?

- Some feedback has suggested that a geographic consultation area for each First Nation will be an effective mechanism to identify which First Nations should be consulted. What factors should be used to identify consultation areas?

  - available TUS information (in government, as identified by First Nations)
  - proximity of a First Nation to a project?
  - a previously demonstrated interest in an area?
  - existing information held by the Project Proponent or Alberta?

- Should there be a test such as a directly-affected test to determine which First Nation should be consulted?

1. Identifying projects that may require consultation.
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  - proximity of a First Nation to a project?
  - a previously demonstrated interest in an area?
  - existing information held by the Project Proponent or Alberta?

- Should there be a test such as a directly affected test to determine which First Nation should be consulted?

ISSUE 3: Once it is determined which First Nations to consult with, how should they be contacted?

Guidelines must ensure that there is a clear procedure for notifying First Nations about a project. Alberta is particularly interested in hearing from First Nations on this issue. The notification procedure must allow for different First Nations to specify to whom the notice should be directed and to select from a list of delivery options (e.g., registered mail, email, fax, etc.).

Key Discussion Points

In discussions so far, the following ideas have been suggested. Do you have other ideas?

- One option is to have the First Nation designate a contact person through a Band Council Resolution and to have that person organize consultation on future projects.
- What do we do in cases where First Nations do not provide preferred methods of notification or key contact information?
- What steps should be included in the procedure?
  - Once a FN has been notified, what steps do the FNs need to take to respond to the notice?
  - In the notice sent to FNs, what information should be included?
  - What information should be required when First Nations respond to a notice?
- Are there other models that First Nations can use for consultation? E.g., regional consultation offices, tribal or treaty consultation offices, etc.

ISSUE 4: What criteria will be used to determine whether consultation has been adequate?

Guidelines should identify common criteria to be applied by Alberta decision-makers when determining whether consultation has been adequate. What criteria should be applied?

Key Discussion Points

In discussions so far, the following ideas have been suggested. Do you have other ideas?

The following have been suggested as criteria which could be used by decision-makers:

- Was the appropriate First Nation notified of the project?
- Was sufficient information provided?
- Has the First Nation provided feedback? Did they explain the specific concern?
- Was the concern related to a First Nations Right or Traditional Use[4]?

- To what extent does the proposed project have the potential to adversely impact a First Nation Right or Traditional Use?
- What would be appropriate criteria to identify adverse impacts?
- Was reasonable time given for input, considering the nature of the impact?
- Was the feedback considered before the decision was made?
- Were reasonable efforts made to mitigate/accommodate the First Nations' concerns?

OTHER ISSUES?

We've identified the above issues in our discussions so far. Have we identified the right issues? Are there other issues that should be addressed in the Framework?

Implementing Consultation Guidelines

Once the Framework for Guidelines is complete, the Guidelines will be developed to achieve the following objectives:

- to implement the Policy effectively;
- to address the concerns of First Nations about impacts on First Nations' Rights and Traditional Uses;
- to design an effective and timely consultation process;
- to increase certainty for all participants and clarify roles and responsibilities in the consultation process; and
- to meet any legal obligations to consult.

Alberta will conduct the following key activities for implementing the Policy and Guidelines:

Year 1 (2005-06): Work with First Nations and industry to finalize the Guidelines by spring of 2006. Work with First Nations to identify how they wish to be consulted on projects. Assess whether regulatory change is required. Work with First Nations on internal capacity-building.

Year 2 (2006-07): Assess whether regulatory change is required and continue capacity-building.

Year 3 (2007-08): Begin regulatory change and continue capacity-building.

Year 4 (2008-09): Review of the Policy and the Guidelines.

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